

# Action Should Follow Words: Assessing the Arbitral Response to Zero-Tolerance Workplace Violence Policies

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## I. INTRODUCTION

*The arbitrator's analysis ignores the obvious—violence in the workplace is an ever increasing occurrence that creates serious safety and health issues for employers. His analysis also ignores the reality that workplace anger and violence is often ignored by employers who fail to take appropriate steps to defuse potential violence before it erupts. The evidence before this arbitrator was that [the grievant's] threats created fear and concern for the safety of others. This Court can find no rationality in a decision that seeks to protect a threatening and intimidating employee in the workplace while requiring the recipients of such conduct and others in the workplace to work in fear or under intimidating circumstances.<sup>1</sup>*

The adoption of a zero-tolerance workplace violence policy<sup>2</sup> has become standard practice for a majority of employers.<sup>3</sup> Zero-tolerance policies put

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<sup>1</sup> *Catholic Cemeteries v. R.I. Laborers Dist. Council*, 177 L.R.R.M. (BNA) 2148, 2154 (2005). The *Catholic Cemeteries* decision vacated an arbitrator's decision that reinstated an employee who had made threatening comments to co-workers. *Id.* at 2151–54. For a discussion of the court's decision and the underlying facts of the case, see Edward Fitzpatrick, *Judge Upholds Dismissal of Worker over Threats*, THE PROVIDENCE J., Apr. 28, 2005, at A01.

<sup>2</sup> See *infra* Part III.A for an extensive discussion of zero-tolerance workplace violence policies.

<sup>3</sup> Indeed, a simple search of the internet for examples of zero-tolerance workplace violence policies reveals hundreds of examples. See, e.g., City of Stamford and Stamford Board of Education Zero-Tolerance Workplace Violence Policy, <http://cityofstamford.org/filestorage/25/52/142/256/WorkplaceViolencePolicy.pdf> (last visited March 1, 2009) (“The City/Board will not tolerate any acts of violence committed by or against City/Board employees. . .”); University of Virginia Workplace

employees on notice that the employer will not tolerate any threatening or violent behavior by employees in the workplace.<sup>4</sup> Most zero-tolerance policies further state that any employee found to be in violation of the policy will be subject to significant discipline, up to and including discharge.<sup>5</sup> Clearly, therefore, employers who have adopted zero-tolerance policies believe that workplace violence is a serious problem that must be quashed in its infancy and ultimately eliminated from the workplace.

One aspect of the problem of workplace violence that has not been closely scrutinized is the response of labor arbitrators to employee discharges based upon violations of zero-tolerance workplace violence policies. This article examines several recent labor arbitration decisions where employers adopted and attempted to enforce zero-tolerance workplace violence policies, and concludes that arbitrators have not yet completely bought into the concept of zero-tolerance for violent or threatening employee behavior in the workplace.<sup>6</sup> That is, although arbitrators have begun to discuss how serious (and potentially deadly) the problem of workplace violence has been and can be, arbitrators' actions have not necessarily kept pace with their words. Some arbitrators appear inclined to pay lip service to the concept of zero-tolerance, while at the same time overlooking or justifying employee behavior that, on its face, clearly runs afoul of the concept of zero-tolerance for threatening or violent employee behavior.

If, as nearly everyone agrees, workplace violence is a serious issue that employers have an obligation to address, then the current arbitral response to zero-tolerance workplace violence policies is misguided.<sup>7</sup> For the sake of

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Violence/Hostility Policy, <http://www.hrs.virginia.edu/policies/emprel/classified/violence.html> (last visited March 1, 2009) ("This is a zero-tolerance policy, meaning that the University disciplines or terminates every employee found to have violated the policy.").

<sup>4</sup> See, e.g., City of Stamford and Stamford Board of Education Zero-Tolerance Workplace Violence Policy, *supra* note 3.

<sup>5</sup> *Id.*

<sup>6</sup> See *infra* Part III.B for a discussion of recent workplace violence arbitration decisions.

<sup>7</sup> The societal consensus on the seriousness of the problem of workplace violence is perhaps best reflected by the fact that the Occupational Safety and Health Administration ("OSHA") promulgated guidelines suggest that the general duty clause of the Occupational Health and Safety Act imposes a duty on employers to provide a safe workplace for their employees. 29 U.S.C. § 654(a)(1) (2000); see also James R. Todd, Comment, "It's Not My Problem": How Workplace Violence and Potential Employer Liability Lead to Employment Discrimination of Ex-Convicts, 36 ARIZ. ST. L.J. 725, 751 (2004) ("[I]n 1996 OSHA promulgated guidelines aimed at creating a 'general duty' to prevent workplace violence for employers in the health care, social service, and night

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safeguarding the workplace and protecting both employees and the general public, the adoption of a zero-tolerance workplace violence policy should result in more deference to the disciplinary decisions of employers if violations of the policy are proven at an arbitration hearing. Indeed, at the very least, an arbitrator's consideration of typical factors that might mitigate an employer's decision to discharge an employee for other types of work performance issues or workplace misconduct should be curtailed or, at a minimum, scrutinized more closely where an employer has made a conscious decision to adopt and enforce a policy prohibiting all incidents of workplace violence.<sup>8</sup> For the value of deterrence alone, employers should have the right to decide that they will not tolerate any threatening or violent employee behavior in the workplace. They should also have the right to decide that their employees should not be forced to live in fear of other workers who have a history of such behavior. The arbitral concept of just cause should be broad enough to support a zero-tolerance policy and to allow arbitrators to uphold employee discharges for violations of such a policy.<sup>9</sup> The problem of workplace violence is too serious for any other result.

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retail professions.”). For an interesting discussion of OSHA's attempt to regulate workplace violence and the reaction to it, see Michael Wiesenfeld, Comment, *Death of a Salesman: A True Story About OSHA Recommendations and Workplace Homicide*, 3 U. PA. J. LAB. & EMP. L. 133, 141–57 (2000).

<sup>8</sup> Perhaps the question that should be asked by arbitrators in these cases is whether workplace violence should be treated the same way as attendance problems, drug and alcohol violations, and other types of standard employee misconduct leading to discipline. The premise of this article is that workplace violence is different than such other types of employee misbehavior and should be treated accordingly by labor arbitrators.

<sup>9</sup> Nearly every collective bargaining agreement provides that an employer may only discharge employees for behavior or misconduct that constitutes “just cause.” Although just cause is typically not defined in collective bargaining agreements, arbitrators often apply a series of tests to determine whether an employer has met its burden of establishing just cause. Those tests generally are described as follows:

1. *Notice*: Did the [e]mployer give to the employee forewarning of foreknowledge of the possible or probable consequences of the employee's disciplinary conduct?
2. *Reasonable Rule or Order*: Was the [e]mployer's rule of managerial order reasonably stated to (a) the orderly, efficient, and safe operation of the [e]mployer's business, and (b) the performance that the [e]mployer might properly expect of the employee?
3. *Investigation*: Did the [e]mployer, before administering the discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

## II. WORKPLACE VIOLENCE: THE PROBLEM

The statistics on workplace violence are both frightening and compelling.<sup>10</sup> As one commentator reported:

One out of every four employees will be a victim of workplace violence during their life. One out of every six violent crimes occurs in the workplace. As an occupational hazard, homicide is the second leading cause of death, accounting for one sixth of all occupational fatalities. Every year 1,000 people are murdered in the workplace; another 1.5 to 2 million people are victims of assault, rape, or robbery. Offenders use various means to disrupt

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4. *Fair Investigation*: Was the [e]mployer's investigation conducted fairly and objectively?

5. *Proof*: At the investigation, did the [e]mployer obtain substantial evidence or proof that the employee was guilty as charged?

6. *Equal Treatment*: Has the [e]mployer applied its rules, orders, and penalties even handedly and without discrimination to all employees?

7. *Penalty*: Was the degree of discipline administered by the [e]mployer in a particular case reasonably related to (a) the seriousness of the employee's proven offense, and (b) the record of the employee in his/her service with the employer? (Were there mitigating circumstances)?

City of El Paso, 124 Lab. Arb. Rep. (BNA) 1583, 1591 (2008) (Jennings, Arb.). The seven tests of just cause were first articulated by Arbitrator Carroll Daugherty in Enterprise Wire Co., 46 Lab. Arb. Rep. (BNA) 359 (1966). *Id.*; See also City of Seaside, 119 Lab. Arb. Rep. (BNA) 1341, 1345-46 n.2 (2004) (Reeves, Arb.). For an interesting discussion of the meaning of just cause in the context of an analysis of the congruence of management and labor interests in the workplace, see Roger I. Abrams & Dennis R. Nolan, *Toward a Theory of "Just Cause" in Employee Discipline Cases*, 1985 DUKE L.J. 594, 610-22 (1985).

<sup>10</sup> Statistics, perhaps, do not tell the whole story. For several examples of the horror of workplace violence and the impact it can have on people's lives, see Ann E. Phillips, *Violence in the Workplace: Reevaluating the Employer's Role*, 44 BUFF. L. REV. 139, 139-40 (1996); see also Kristine L. Hayes, Note & Comment, *Prepostal Prevention of Workplace Violence: Establishing an Ombuds Program as One Possible Solution*, 14 OHIO ST. J. ON DISP. RESOL. 215, 215-26 (1998) (relating the story of a postal employee who, "reportedly angry that his request to be transferred to the day shift was denied, killed a coworker he apparently disliked, seriously wounded a supervisor who had reprimanded him, and injured another worker caught in the line of fire."); Wiesenfeld, *supra* note 7, at 133-34 (recounting an incident where a Subway sandwich shop employee was shot and killed while working at a store in South Pasadena, Florida).

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the workplace. For example, everyday 16,400 threats are made, 723 workers are attacked and 43,800 workers are harassed.<sup>11</sup>

According to the Bureau of Labor Statistics (“BLS”) 2005 Survey of Workplace Violence Prevention, more than five percent of American workplaces experienced some sort of workplace violence incident during the previous twelve months.<sup>12</sup> Nearly half of the nation’s largest establishments—those that employ more than 1,000 workers—reported an incident of workplace violence in the twelve month period preceding the BLS survey.<sup>13</sup> Overall, public sector employers fared worse than private sector employers, with state governments having the highest percentage of incidents per employee.<sup>14</sup> Moreover, at least one study has estimated that the annual cost of workplace violence incidents is \$35 billion.<sup>15</sup>

Workplace violence may take many forms. It can involve murder, physical assaults, harassment, or threats.<sup>16</sup> The BLS categorizes workplace violence incidents into the following groups: criminal incidents, customer or client incidents, co-worker incidents, and domestic violence incidents.<sup>17</sup> The problem is not limited to any particular workplace, as both small and large employers, workplaces with both substantial and non-existent contact with the public, and high-crime and low-crime working locations all reported incidents of workplace violence during the twelve months surveyed by the

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<sup>11</sup> Kyle Riley, *Employer TROs Are All the Rage: A New Approach to Workplace Violence*, 4 NEV. L.J. 1, 3 (2003).

<sup>12</sup> BUREAU OF LABOR STATISTICS, U.S. DEPARTMENT OF LABOR, SURVEY OF WORKPLACE VIOLENCE PREVENTION 1 (2005), <http://www.bls.gov/iif/oshwc/osnr0026.pdf> [hereinafter “BLS SURVEY”].

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* Thirty-two percent of state government employers experienced an incident of workplace violence during the survey period. *Id.*

<sup>15</sup> Amy D. Whitten & Deanne M. Mosley, *Caught in the Crossfire: Employers’ Liability for Workplace Violence*, 70 MISS. L.J. 505, 507 (2000).

<sup>16</sup> Phillips, *supra* note 10, at 140–42.

<sup>17</sup> See BLS SURVEY, *supra* note 12, at 4; see also Lea B. Vaughn, *Victimized Twice—The Intersection of Domestic Violence and the Workplace: Legal Reform Through Curriculum Development*, 47 LOY. L. REV. 231, 237 (2001) (discussing similar categorizations of workplace violence). Perhaps as the result of the link between domestic and workplace violence, “[w]ith respect to women, workplace violence is the number one cause of workplace death in the United States.” Whitten & Mosley, *supra* note 15, at 506.

BLS.<sup>18</sup> Additionally, workplace violence takes a toll in the workplace in many ways, including employee fear and anxiety, absenteeism, attrition, decreased productivity, and lower employee morale.<sup>19</sup>

Violent episodes between employees are perhaps the most difficult type of workplace violence to prevent. As one author has noted, “[c]o-worker violence is the most insidious type of workplace violence and probably the hardest to control since most employees need relatively free access to the workplace and to one another in order to do their jobs.”<sup>20</sup> As a result, employers cannot use security systems, guards, or other types of external security measures to keep such violence from the workplace. Rather, employee-on-employee workplace violence must be prevented through employers’ monitoring and adoption of policies to deal with the behavior of their own employees who populate the workplace every day.<sup>21</sup>

Clearly, workplace violence is recognized as a serious problem in the American workplace.<sup>22</sup> As one commentator has reported: “America has

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<sup>18</sup> See BLS SURVEY, *supra* note 12, at 9. Some of the most common risk factors for workplace violence include contact with the public; exchange of money; delivery of passengers, goods, and services; having a mobile workplace (such as a taxicab); working with volatile and unstable persons; working in isolation; working late at night or in the early morning; working in high crime areas; guarding valuables; and working in community-based settings. Jane Lipscomb et al., *Perspectives on Legal Strategies to Prevent Workplace Violence*, 30 J.L. MED. & ETHICS 166, 167 (2002).

<sup>19</sup> BLS SURVEY, *supra* note 12, at 7. See also Riley, *supra* note 11, at 2–3 (“Workplace violence also has a ripple effect, affecting not only the targeted victim, but everyone associated with the workplace.”).

<sup>20</sup> Barbara Ryniker Evans, *When Violence Invades: Coming to Blows in the Workplace*, 43 LA. B. J. 448, 449 (1996).

<sup>21</sup> Riley, *supra* note 11, at 6 (“Physical security measures may be ineffective in preventing co-worker/former employee . . . workplace violence.”).

<sup>22</sup> The problem is not unique to the United States. See Bini Litwin, *A Conceptual Framework for a Multi-Factor, Multi-Level Analysis of the Origins of Workplace Violence*, 8 ILSA J. INT’L & COMP. L. 825, 828–32 (2002) (“Violence in the workplace is not a phenomenon unique to any particular country or culture.”); see also Robert S. Goldberg, Comment, *Victims of Criminal Violence in the Workplace: An Assessment of Remedies in the United States and Great Britain*, 18 COMP. LAB. L.J. 397, 398 (1997) (“Both the statistics, and the violent behavior of our youth, suggest that in Great Britain and in the United States, violence in the workplace is, and will continue to be, a persistent and pervasive problem.”). For a contrary viewpoint on the extent of the problem of workplace violence, see Vicki A. Laden & Gregory Schwartz, *Psychiatric Disabilities, the Americans with Disabilities Act, and the New Workplace Violence Account*, 21 BERKELEY J. EMP. & LAB. L. 246 (2000). Ms. Laden and Mr. Schwartz essentially argue that the exaggerated threat of workplace violence has contributed to the judicial weakening of the protections of the Americans with Disabilities Act. *Id.* at 249–51, 270.

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become increasingly aware of the growing problem of workplace violence. . . Now, and perhaps permanently, violence has become commonplace.”<sup>23</sup> Accordingly, given the ongoing and pervasive problem of violence in the workplace, as set forth below in detail, this article posits that the arbitral response to employers’ adoption of zero-tolerance workplace violence policies—one of the primary weapons employers utilize to deal with workplace violence—has not necessarily been consistent with the concept of zero-tolerance for workplace violence. Rather, although arbitrators increasingly have begun to discuss the societal intolerance for and condemnation of workplace violence, arbitrators’ actions have not uniformly kept up with their words when it comes to their review of discipline imposed for employee violations of zero-tolerance workplace violence policies.<sup>24</sup>

### III. ZERO-TOLERANCE WORKPLACE VIOLENCE POLICIES AND THE ARBITRAL RESPONSE

#### A. Zero-Tolerance Workplace Violence Policies

Perhaps the most prevalent employer response to the problem of workplace violence has been the adoption of a zero-tolerance workplace violence policy.<sup>25</sup> Indeed, nearly every discussion of employer personnel

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<sup>23</sup> Stephen Kelson, *Violence Against Lawyers: The Increasingly Attacked Profession*, 10 B.U. PUB. INT. L.J. 260, 260 (2001). Mr. Kelson discusses an oft-ignored area of workplace violence: violence against lawyers and the legal profession. *Id.*; accord Phillips, *supra* note 10, at 193 (“Workplace violence is a serious problem that needs to be addressed.”); see also Thomas Faust & Michael Raffo, *Local Trial Court Response to Courthouse Safety*, 576 ANNALS 91 (2001) (discussing the need for security in and around courthouses).

<sup>24</sup> The title of this article springs from this idea: namely, that arbitrators’ actions in reviewing employer disciplinary actions under zero-tolerance workplace violence policies should keep pace with their own rhetoric (as well as the language in the policies themselves) describing how serious the problem of workplace violence is and endorsing the concept of zero-tolerance.

<sup>25</sup> See Stephen J. Beaver, Comment, *Beyond the Exclusivity Rule: Employer’s Liability for Workplace Violence*, 81 MARQ. L. REV. 103, 120 (1997) (“In response to the growing epidemic of workplace violence, employers have engaged in the practice of monitoring employee conduct as a means of enforcing ‘zero tolerance policies’ for violence in the workplace.”). Some commentators have suggested that encouraging employers to provide accurate references for former employees is another effective method for eliminating workplace violence. See, e.g., Markita D. Cooper, *Beyond Name, Rank, and Serial Number: “No Comment” Job Reference Policies, Violent Employees and the Need for Disclosure-Shield Legislation*, 5 VA. J. SOC. POL’Y & L. 287, 334 (1998)

policies includes a recommendation for some version of a zero-tolerance workplace policy.<sup>26</sup> Although the provisions will vary from policy to policy, the basic premise of each such policy is that the employer has drawn a line in the sand in regard to certain types of violent or threatening employee behavior. This then places employees on notice that, if an employee steps over that line, the employee will be discharged or otherwise disciplined without exception.<sup>27</sup> Even in unionized workplaces, which typically have collective bargaining agreements that limit the employer's right to discipline and discharge employees except where just cause exists, zero-tolerance workplace violence policies prevail.<sup>28</sup> One commentator has described that "[t]he smartest and most defensive way to be able to investigate, document, and discipline workplace violence is to develop a clear, written company policy that indicates zero-tolerance towards any type of threat, actual or

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("In today's world of increasing workplace violence, prospective employers need to know if job applicants have engaged in violent conduct in the workplace."). For a contrary view, see John Ashby, Note, *Employment References: Should Employers Have an Affirmative Duty to Report Employee Misconduct to Inquiring Prospective Employers?*, 46 ARIZ. L. REV. 117, 148 (2004) (arguing that affirmative duty of disclosure of workplace violence to prospective employers would do little to diminish workplace violence).

<sup>26</sup> See Lipscomb et al., *supra* note 18, at 170 (recommending adoption of a policy for "zero-tolerance for threats and physical assaults and communication of this message to managers, supervisors, staff . . ."); Kimberly Gee Stith, *Violence in the Workplace: The Armed and Angry Employee*, 29 THE BRIEF 8, 16 (1999) (recommending the promotion of a "violence-free environment" through, *inter alia*, the adoption of a "written zero-tolerance policy prohibiting weapons of any kind at the job."); William R. Corbett, *The Need for a Revitalized Common Law of the Workplace*, 69 BROOK. L. REV. 91, 100 n.45 (2003) ("A legislative panel in Massachusetts studying workplace violence . . . recommended that employers adopt 'zero tolerance policies' on workplace violence. . . ."); Judy Perry Martinez, *Making a Difference: Some Thoughts on Community Collaboration and Individual Effort*, 47 LOY. L. REV. 33, 39 (2001) (advocating, in the domestic violence prevention context, that managers use their "position in management of [their] company to persuade [their] employer to adopt a workplace violence policy and safety plan for all employees."). See also FRANK ELKOURI & EDNA A. ELKOURI, *HOW ARBITRATION WORKS* 1015 (Allen Miles Ruben ed., 6th ed. 2003) ("Increasingly, employers cite the requirements of the [Occupational Safety and Health Act's] 'general duty' clause to support the implementation and enforcement of zero-tolerance policies against workplace violence.").

<sup>27</sup> See ELKOURI & ELKOURI, *supra* note 26, at 1020–21.

<sup>28</sup> See, e.g., Philip Morris U.S.A., 2006 WL 3905024 (May 20, 2006) (Nolan, Arb.) ("Like all major employers, [the employer] has strong policies against workplace violence and harassment.").



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implied. Policy formation gives employees notice as to the direction and discretion used by employers.”<sup>29</sup>

Given the seeming societal consensus on the problem of workplace violence and the movement of employers towards ensuring that no acts of violence are tolerated in their respective workplaces, one would expect that employers would tend to prevail in labor arbitrations in which the employee was discharged for a violation of a zero-tolerance workplace violence policy. As set forth below, however, it is clear based upon a review of reported arbitration decisions that arbitrators do not necessarily defer to zero-tolerance enforcement in the workplace violence arena. As one union’s website puts it, at the current time, “[a] zero-tolerance policy does not take away the arbitrator’s authority to determine whether the discipline was for just cause.”<sup>30</sup>

### B. *The Arbitral Response*

A review of recent decisionmaking by labor arbitrators in the context of discipline for violations of zero-tolerance workplace violence policies is instructive.<sup>31</sup> In order to fully illuminate these issues, consider the following arbitration decisions.

#### 1. *The Case of Self Defense*

In *Archer Daniels Midland Co.*,<sup>32</sup> the employer discharged two employees who engaged in a fistfight over which employee had been assigned to perform a particular job.<sup>33</sup> In doing so, the employer relied upon a zero-tolerance workplace violence policy that provided, in relevant part:

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<sup>29</sup> Kimberly Smith, Comment, *A Plea for Mandatory Disclosure: Urging Michigan’s Legislature to Protect Employees Against Increasing Phenomena of Workplace Violence*, 79 U. DET. MERCY L. REV. 611, 627 (2002).

<sup>30</sup> Communications Workers of America, Local 7804, *Workplace Threats: Threats of Violence*, <http://www.cwalocal7804.org/wkplthreat.htm> (last visited March 1, 2009).

<sup>31</sup> As many labor arbitration decisions are never reported or published, it is impossible to undertake a comprehensive review of labor arbitration decisions in this area.

<sup>32</sup> *Archer Daniels Midland Co.*, 123 Lab. Arb. Rep. (BNA) 1077 (2007) (Staudohar, Arb.).

<sup>33</sup> *Id.* at 1078.

Workplace violence can be any act of physical violence, threats of physical violence, harassment, intimidation, or other threatening or disruptive behavior that occurs in the workplace . . .

....

It has become a reasonable prudent practice in the business community to establish procedures for the prevention of, and appropriate response to, violence in the workplace. The primary reasons for these procedures are to reduce the risk of violence aimed at employees and company property, and wherein possible, to provide a work environment free of any intimidating or coercive behavior. *The [employer's] Workplace Threats and Violence Procedures established zero-tolerance for threats and violence in the workplace.*<sup>34</sup>

The union grieved the termination of the employee who it believed was not responsible for starting the fight, asserting that, despite the existence of the zero-tolerance policy, the employer did not have just cause to discharge the grievant.<sup>35</sup> More specifically, the union argued that the employer's decision to discharge should not stand because the grievant's participation in the fight was merely self-defense, in that the other employee had provoked the grievant and then escalated the physical confrontation.<sup>36</sup>

Although acknowledging that the grievant played a role in escalating the conflict and should be held culpable for his role in the violent episode, the arbitrator determined that the employer did not have just cause to discharge the grievant.<sup>37</sup> In so holding, the arbitrator perhaps acknowledged his decision's conflict with the company's zero-tolerance workplace violence policy when he wrote:

On cross-examination, the [g]rievant admitted that he pushed [the other employee] before [the other employee] touched him. Therefore, the [g]rievant said he made first contact in the fight. He also acknowledged being trained under the zero tolerance policy and understood that there would not be a second chance if he participated in a fight.<sup>38</sup>

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<sup>34</sup> *Id.* at 1080 (emphasis in original). Presumably, fighting would run afoul of the prohibitions on workplace violence contained in this policy.

<sup>35</sup> *Id.* at 1081.

<sup>36</sup> *Id.* The other employee involved in the fight contradicted this testimony, asserting that the grievant had been the aggressor during the altercation. *Id.* at 1082.

<sup>37</sup> *Id.* at 1083.

<sup>38</sup> Archer Daniels Midland Co., 123 Lab. Arb. Rep. (BNA) at 1083.

Despite these admissions, the arbitrator did not defer to the employer's imposition of discipline under the zero-tolerance policy.<sup>39</sup> Rather, the arbitrator chose to reinstate the employee to his position.<sup>40</sup> Specifically, the arbitrator held that the grievant's violent behavior should be excused—at least to the point of allowing him to return to his job—because the other employee involved in the altercation had been the “instigator of the fight.”<sup>41</sup> In overturning the employer's decision, however, the arbitrator stated his belief that “the [g]rievant is held accountable under the [c]ompany's zero-tolerance policy.”<sup>42</sup>

Thus, despite the fact that the company had promulgated a policy stating that an employee would be discharged if the employee engaged in a fight, trained employees in that policy, and then attempted to enforce the policy against an employee who had made the first physical contact in a violent workplace altercation, the arbitrator still did not believe that the company had just cause to discharge the employee. Clearly, therefore, the arbitrator did not regard the adoption of a zero-tolerance policy as having any limitation on his ability to reinstate an employee. Nor did the arbitrator believe that the employer's decision to draw a line in the sand in regard to violent workplace episodes was entitled to any amount of deference.<sup>43</sup> To the contrary, the arbitrator applied his own standards for the treatment of workplace violence and reinstated the employee to his position in contravention of the intent of the zero-tolerance policy.<sup>44</sup>

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.* The employee was reinstated to his position without any back pay, but with restoration of his seniority rights. *Id.* at 1084.

<sup>41</sup> *Id.* at 1083.

<sup>42</sup> *Id.* The arbitrator did not specifically explain how his decision, in the context of zero-tolerance for workplace violence, held the grievant accountable under the policy, given the grievant's express admission that he delivered the first blow in the physical confrontation.

<sup>43</sup> The arbitrator also did not discuss the problem of workplace violence or what, in the context of dealing with that problem, employers would have to do to get an arbitrator to sustain the discharge of an employee who threw the first punch in a fight in the workplace arising out of a work-related dispute.

<sup>44</sup> This fact must have troubled the arbitrator somewhat, as the last line of his decision attempted to reconcile his decision with the intent of the zero-tolerance policy. Archer Daniels Midland Co., 123 Lab. Arb. Rep. (BNA) at 1083. See discussion, *supra* note 42.

## 2. The Flawed Investigation and Stressed Workforce Case

The arbitrator in *Lockheed Martin Aeronautics Co.*<sup>45</sup> was asked to consider whether the employer had just cause to discharge an employee who took part in a series of altercations with a fellow employee during his shift.<sup>46</sup> Specifically, the grievant engaged in a sequence of heated arguments with an engineer who was assigned to the grievant's work project.<sup>47</sup> The grievant also had been observed on frequent occasions sitting in his car "fixated on staring straight ahead."<sup>48</sup> Although the grievant had no record of discipline based upon his behavior, his actions in the workplace had been sufficiently strange and unsettling such that other employees provided statements to the employer indicating that "they were concerned for their safety based on the [g]rievant's behavior."<sup>49</sup>

Like the employer in *Archer Daniels Midland Co.*,<sup>50</sup> the employer had adopted a zero-tolerance workplace violence policy, which provided in relevant part that the employer "will not tolerate or condone any acts or threats of violence committed by or against our employees . . . ."<sup>51</sup> The arbitrator further described the employer's reason for adopting the zero-tolerance policy:

The [e]mployer is extremely sensitive about any behavior indicators, which could lead to workplace violence. In July 2003 in the [c]ompany's Meridian Mississippi plant an employee, armed with multiple firearms, shot and killed five co-workers and wounded nine more co-workers before killing himself. As a result of this incident the [c]ompany's leadership instituted a zero-tolerance policy against workplace violence. This effort included management policy postings in common areas and affirmations from employees that they would abide by conduct rules prohibiting

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<sup>45</sup> *Lockheed Martin Aeronautics Co.*, 123 Lab. Arb. Rep. (BNA) 244 (2006) (Riker, Arb.).

<sup>46</sup> *Id.* at 246.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* The company concluded that this was indicative of "highly stressed behavior" on the part of the grievant. *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *See Archer Daniels Midland Co.*, 123 Lab. Arb. Rep. (BNA) 1077 (2007) (Staudohar, Arb.).

<sup>51</sup> *Lockheed Martin Aeronautics Co.*, 123 Lab. Arb. Rep. (BNA) at 245.

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acts of intimidation or any behavior that could adversely affect the interests or reputation of the [c]ompany.<sup>52</sup>

The grievant was aware of the zero-tolerance policy, having signed an employee conduct affirmation setting forth the policy on two separate occasions.<sup>53</sup> Moreover, the grievant had received counseling approximately a month before his discharge concerning the fact that he had engaged in inappropriate behavior that was indicative of the potential for workplace violence.<sup>54</sup>

Despite the existence of the zero-tolerance policy and the employer's sad history with the issue, the arbitrator overturned the employer's decision to discharge the grievant.<sup>55</sup> The arbitrator reasoned that the employer's investigation of the incident was flawed because it primarily sought only one side of the story, that of the engineer who became involved in the altercation with the grievant.<sup>56</sup> Although noting that the employer, in discharging the grievant, also had been concerned about previous incidents that may have demonstrated a propensity for violence on the part of the grievant, the arbitrator found that those concerns were not established because they merely were based upon "a collection of witness statements largely from the [e]mployer's management or professional staff."<sup>57</sup> Overall, while conceding

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<sup>52</sup> *Id.* at 246.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 253.

<sup>56</sup> *Id.* at 250. In so holding, the arbitrator conceded that the investigation was not completely one-sided because the grievant "did provide a statement of the event . . ." *Id.*

<sup>57</sup> Lockheed Martin Aeronautics Co., 123 Lab. Arb. Rep. (BNA) at 251. It is not clear why the arbitrator would automatically disregard the significance or question the credibility of such statements. He did, however, explain a portion of his reasoning as follows:

Within the witnesses' statements and testimony presented by the [e]mployer there are other alleged instances of hostile or threatening behavior by [the grievant] that would lend credence toward augmenting the rationale for his immediate discharge. This included instances of "staring down" personnel, deliberately bumping into others, as well as multiple verbal exchanges. From the breadth of witness statements and testimony it is credible that this type of behavior may have occurred and it would have been appropriate for the [e]mployer to apply this as background, indicating a potentially progressively deteriorating aggressive behavior pattern by the [g]rievant that needed attention or action. However, there was no documentation that showed the [g]rievant was timely challenged or counseled. Further, other evidence cited to justify the termination was also either marginally investigated or incomplete.

that the grievant had a history of troubling incidents in the workplace, the arbitrator did not believe that the investigation of the grievant's past, as well as the incident that led to his termination, were sufficient to support a discharge.<sup>58</sup> The arbitrator further appeared to justify the grievant's behavior, in part, as the result of a stressful working environment, noting that "[t]he testimony reveals a very stressful scene of a team working long hours and near continuous workdays to meet a high-profile project requirement."<sup>59</sup>

Like the arbitrator in *Archer Daniels Midland*,<sup>60</sup> the *Lockheed Martin* arbitrator spoke approvingly of the employer's zero-tolerance workplace violence policy: "It is also appropriate to consider the [e]mployer's obligation to provide a safe workplace and thus be justified to aggressively pursue controlling any indicators that may be threatening."<sup>61</sup> Clearly, however, the arbitrator did not find such considerations compelling enough to uphold the grievant's discharge for violating the employer's policy against workplace violence.<sup>62</sup> Indeed, the arbitrator did not uphold any discipline whatsoever against the grievant, reinstating him with an award of full back pay and benefits and a directive to remove any notation of discipline stemming from the incident from the grievant's personnel file.<sup>63</sup>

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*Id.*

<sup>58</sup> *Id.* at 251–52.

<sup>59</sup> *Id.* at 252–53. Although it is clear that the purported working environment played a role in the arbitrator's decision, it is not clear how such considerations fit within the logic of the arbitrator's reliance on the purportedly flawed investigation. Indeed, if, as the arbitrator seemed to suggest, the grievant's behavior would have justified discharge under the zero-tolerance policy if there had been sufficient proof that flowed from an adequate investigation, then how would the existence of a stressful work environment ultimately be relevant or admissible? Moreover, if the existence of a stressful work environment is a justification for workplace violence, then it is doubtful that many decisions to terminate employees for workplace violence will be upheld in arbitration, as such a claim could be made in nearly every American workplace.

<sup>60</sup> See *Archer Daniels Midland Co.*, 123 Lab. Arb. Rep. (BNA) 1077 (2007) (Staudohar, Arb.).

<sup>61</sup> *Lockheed Martin Aeronautics Co.*, 123 Lab. Arb. Rep. (BNA) at 252.

<sup>62</sup> As noted above, this decision must be considered in light of the employer's previous experience with work place violence, in which fourteen employees were either killed or wounded in a shooting at another facility. See *id.* at 245.

<sup>63</sup> *Id.* at 253–54.

### 3. *The Publicity Failure Case*

In *Horsehead Corp.*,<sup>64</sup> the employer discharged the grievant for physically attacking a co-worker who visited his work area.<sup>65</sup> During the altercation, the grievant “struck” the other employee several times and threatened to “kick his ass.”<sup>66</sup> In advance of the arbitration, the employer converted the discharge of the grievant to a suspension when it learned that the other employee involved in the altercation (who had also been discharged) was not likely to appear as a witness or provide testimony at the grievant’s arbitration.<sup>67</sup> Despite the reduced punishment, the union still pursued its grievance challenging the employer’s decision to issue any discipline at all to the employee.<sup>68</sup>

Shortly before the altercation between the grievant and his co-worker, the employer adopted a zero-tolerance workplace violence policy.<sup>69</sup> Although he referenced the policy in his discussion of the appropriateness of discipline for the employee, the arbitrator nevertheless reduced the grievant’s discipline to a fourteen day suspension and ordered that he receive back pay for any other time he was out of work.<sup>70</sup> In doing so, the arbitrator appeared to find significant the fact that “[a]lthough it appears that the [c]ompany warned employees of management’s lowered tolerance for workplace altercations, the record contains no clear indication that the [c]ompany published a formulary of penalties or otherwise informed employees of the penalties that might now apply to workplace altercations.”<sup>71</sup>

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<sup>64</sup> *Horsehead Corp.*, 2006 WL 3876579 (May 12, 2006) (Dissen, Arb.). As Westlaw does not provide pinpoint citations for certain arbitration decisions reported in its labor arbitration database, none will be provided for citations to those materials.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* Presumably, the employer was concerned about its ability to prove its case without the benefit of testimony from the individual who allegedly was struck by the grievant.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* Specifically, the arbitrator noted that “after several employee skirmishes had occurred at that facility, management became sufficiently concerned that it announced and posted a ‘zero-tolerance’ policy toward workplace violence.” *Horsehead Corp.*, 2006 WL 3876579.

<sup>70</sup> *Horsehead Corp.*, 2006 WL 3876579 (May 12, 2006) (Dissen, Arb.).

<sup>71</sup> *Id.* Nonetheless, the arbitrator specifically found that it was “evident from the [g]rievant’s own testimony that he engaged in conduct that the [c]ompany had proscribed.” *Id.*

Accordingly, despite the fact that the employer adopted a policy of zero-tolerance for workplace violence, distributed it to employees, and disciplined an employee in accordance with its stated desire to take incidents of workplace violence very seriously, the arbitrator still did not uphold the discipline.<sup>72</sup> In regard to the issue of publishing a “formulary of penalties,” the arbitrator provided no guidance whatsoever as to what would be an appropriate penalty for particular incidents of workplace violence, nor is there any indication that the arbitrator would defer to such a formulary if he disagreed with the severity of the penalties adopted by the employer.<sup>73</sup>

#### 4. *The Case of the Emotional Abuser*

*Mercury Marine Division of Brunswick Corp.*<sup>74</sup> provided the arbitrator with the opportunity to decide whether an employer had just cause to discharge an employee who purportedly violated a newly adopted zero-tolerance workplace violence policy.<sup>75</sup> The policy made clear the employer’s interest in safety and providing a violence-free working environment for its employees:

[The employer] is committed to promoting a workplace that is comfortable, safe, productive and free from violence. Safety in our business must be part of every operation. And without question, it is every employee’s and manager’s responsibility at all levels to help ensure a safe work place. To accomplish this, every one must be constantly aware of conditions that can produce violence and injuries. Conduct that is violent or threatens violence or emotional abuse will not be tolerated and, depending on the seriousness of the incident, may lead to termination of employment.<sup>76</sup>

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<sup>72</sup> The arbitrator specifically noted that the reasoning behind the employer’s decision to adopt the workplace violence policy was the “deterrent effect.” *Id.*

<sup>73</sup> As with the decisions of the arbitrators in *Archer Daniels Midland Co.*, 123 Lab. Arb. Rep. (BNA) 1077 (2007) (Staudohar, Arb.) and *Lockheed Martin Aeronautics Co.*, 123 Lab. Arb. Rep. (BNA) 244, 252 (2006) (Riker, Arb.), the arbitrator also did not place any weight on the fact that the particular incident leading to the employer’s decisions to discharge the grievant might be indicative of the possibility of a more violent employee incident in the future.

<sup>74</sup> *Mercury Marine Div. of Brunswick Corp.*, 2006 WL 1310350 (Feb. 28, 2006) (Suntrup, Arb.).

<sup>75</sup> The workplace violence policy had gone into effect approximately ten months before the incident that led to the grievant’s discharge. *Id.*

<sup>76</sup> *Id.* As suggested by the arbitrator in *Horsehead Corp.*, 2006 WL 3876579 (May 12, 2006) (Dissen, Arb.), this policy set forth examples of the types of violent behavior



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The employer distributed the zero-tolerance policy to its employees and made clear to all employees that it applied to everyone who entered its facilities, including “non-employees and independent contractors.”<sup>77</sup>

The incident that led to the employer’s decision to discharge the grievant was an altercation between the grievant and a co-worker.<sup>78</sup> Specifically, the employer concluded after an investigation that the grievant had given “the finger” to the co-worker when the co-worker looked in his direction.<sup>79</sup> When the co-worker then confronted him, the grievant charged him, grabbing his hair and leaving marks on his neck as the result of physical contact.<sup>80</sup> Following an investigation, the employer determined that the grievant had violated its new workplace violence policy, and terminated his employment.<sup>81</sup> In particular, the employer determined that the grievant had “engaged in inappropriate, physically aggressive conduct toward a co-worker.”<sup>82</sup>

The arbitrator, however, did not agree with the employer’s decision to discharge the grievant.<sup>83</sup> Although concluding that the grievant had both pushed and grabbed his co-worker, the arbitrator nonetheless decided that the employer did not have just cause for the discharge.<sup>84</sup> In particular, the arbitrator found significant the fact that the workplace violence policy also prohibited “emotional abuse.”<sup>85</sup> The arbitrator determined that the co-worker had played a larger role in the incident than the employer had concluded by somehow provoking the grievant’s violent reaction, thus presumably rendering him guilty of “emotionally abusing” the grievant.<sup>86</sup> The arbitrator

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that would subject the employee to discipline, including termination of employment, under the policy. *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> Mercury Marine Div. of Brunswick Corp., 2006 WL 1310350.

<sup>80</sup> *Id.* Not surprisingly, the grievant’s account of the story differed radically from the co-workers, forcing the employer to make a judgment call about what happened and who was responsible for the incident. *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* The workplace violence policy specifically noted that “[e]mployees engaging in a fight on company property or at a company-sponsored function will be terminated.” *Id.*

<sup>83</sup> Mercury Marine Div. of Brunswick Corp., 2006 WL 1310350.

<sup>84</sup> *Id.* The arbitrator also concluded that the grievant’s physical contact resulted in a scratch to the neck of his fellow employee. *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* The arbitrator apparently concluded that the co-worker was responsible for posting documents about recent legal difficulties experienced by the grievant. *Id.*

then found that the co-worker's testimony at the hearing was not credible, while the grievant's testimony had been.<sup>87</sup>

Thus, the arbitrator found that although the grievant had been in violation of the physical aggression portion of the workplace violence policy, he did not believe termination to be an appropriate penalty.<sup>88</sup> The basis for the reduction in penalty was the "extenuating circumstances" that motivated the grievant's violent behavior, namely the purported "emotional abuse" he suffered from his co-worker.<sup>89</sup> The arbitrator then determined that a ninety-day suspension was sufficient punishment for the grievant's behavior, and reinstated him to his job with back pay awarded for any time he was out of work beyond the ninety-day suspension.<sup>90</sup> In issuing the award, the arbitrator attempted to take account of the employer's zero-tolerance policy by noting that he had viewed the case record "through the prism of the employer's workplace violence policies."<sup>91</sup>

### 5. The "Exceptional" Mitigating Factors Case

In *Sodexo Management, Inc.*,<sup>92</sup> the employer discharged the grievant for slapping the wrist of a co-worker after a workplace disagreement.<sup>93</sup> As the arbitrator made clear in his ruling, the employer's decision was "approved . . . in view of the [c]ompany's 'zero-tolerance policy' in cases of 'workplace violence' . . . ."<sup>94</sup> At the arbitration, however, the employer went beyond the specific slapping incident and introduced the contents of the grievant's personnel file, which included two counseling notices for other misconduct,

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<sup>87</sup> Mercury Marine Div. of Brunswick Corp., 2006 WL 1310350.

<sup>88</sup> *Id.* Significantly, the arbitrator made this finding despite the fact that fighting—a violation of the physical aggression portion of the policy—is specifically delineated as a dischargeable offense in the policy, a fact that presumably would have satisfied the arbitrator's interest in a formulary of penalties for certain offenses in *Horsehead Corp.*, 2006 WL 3876579 (May 12, 2006) (Dissen, Arb.).

<sup>89</sup> Mercury Marine Div. of Brunswick Corp., 2006 WL 1310350.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* It is unclear from the decision exactly what the arbitrator's statement about viewing the case through the "prism" of the policy meant given the inconsistency between the arbitrator's decision and the terms of the policy.

<sup>92</sup> *Sodexo Mgmt., Inc.*, 123 Lab. Arb. Rep. (BNA) 1643 (2007) (Kaufman, Arb.).

<sup>93</sup> *Id.* at 1645. The slap was hard enough that it left a red mark on the wrist of the co-worker. *Id.* at 1644.

<sup>94</sup> *Id.* at 1645. Indeed, the collective bargaining agreement specifically provided that employees may be "immediately discharged" if found guilty of "physical violence." *Id.* at 1647.

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as well as “two statements by other employees accusing [the g]rievant of threatening to ‘punch’ another employee and having ‘temper tantrums.’”<sup>95</sup>

The arbitrator found that the employer had met its burden of proving that the grievant had slapped the co-worker’s wrist.<sup>96</sup> The arbitrator found, however, that such conduct was not sufficient to sustain the employer’s decision to discharge.<sup>97</sup> Specifically, because the employer had considered the employee’s work record in making the decision to discharge, the arbitrator found that he had the right to review the decision to see if the proposed discharge was mitigated by other factors in support of the grievant.<sup>98</sup>

Although the employer determined that it did not believe there was any basis to mitigate the discharge decision—indeed, the grievant’s work record contained at least two counseling notices for poor work performance, as well as two complaints by other employees concerning aggressive behavior by the grievant—the arbitrator ultimately disagreed with that determination and found that the grievant’s work record did provide a basis for overturning the discharge decision.<sup>99</sup> That is, the arbitrator relied on the fact that a manager had provided the grievant with a good job reference after the slapping incident took place.<sup>100</sup> Despite the fact that the reference had not been approved by the employer as required by company policy and the employer did not even know that such a reference letter had been written until a few days before the arbitration, the arbitrator found that the existence of the positive reference weighed in favor of mitigating the decision to discharge the grievant.<sup>101</sup> The arbitrator further found “exceptional” the fact that the grievant had been asked to work extra hours on the same day that she had been accused of slapping the co-worker.<sup>102</sup> The arbitrator thus concluded “that there is a basis for mitigation in this case, and will direct that the

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<sup>95</sup> *Id.* at 1645.

<sup>96</sup> Sodexho Mgmt., Inc., 123 Lab. Arb. Rep. (BNA) at 1647. As noted by the arbitrator, the burden of proof in a discharge labor arbitration rests with the employer. *Id.*

<sup>97</sup> *Id.* at 1648.

<sup>98</sup> *Id.* at 1647.

<sup>99</sup> *Id.* at 1647–48.

<sup>100</sup> *Id.* at 1648. The reference praised the grievant for, among other things, being dependable, showing up on-time, and working hard. Sodexho Mgmt. Inc., 123 Lab. Arb. Rep. (BNA) at 1648.

<sup>101</sup> *Id.* at 1645, 1648.

<sup>102</sup> *Id.* at 1648.

discharge be reversed and that the [g]rievant be reinstated without loss of seniority.”<sup>103</sup>

## 6. Summary

Although there are certainly examples of arbitrators who have accepted and upheld the concept of zero-tolerance for workplace violence,<sup>104</sup> the arbitral reaction to such policies has not been uniformly supportive of the concept of zero-tolerance. Whether it be because of mitigating factors such as the employee’s work record, provocation, self-defense, the adequacy of the employer’s investigation into the misconduct, or notice issues relating to informing employees of the degree of penalty they may receive for engaging in violent behavior, many arbitrators apparently have not responded to the proliferation of zero-tolerance workplace violence policies by deferring to managerial disciplinary decisions for workplace violence or otherwise limiting the types of procedural arguments or exculpatory employee defenses typically found in other types of discharge cases.<sup>105</sup> Thus, although American employers appear to be moving toward a consensus that workplace violence is a serious problem that cannot be tolerated in any way, shape, or form, labor arbitrators have not consistently issued rulings in accord with that

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<sup>103</sup> *Id.* The arbitrator did not order the employer to pay the grievant any back pay. *Id.*

<sup>104</sup> For example, in *Lansing Community College*, 122 Lab. Arb. Rep. (BNA) 1392, 1401 (2006) (McDonald, Arb.), the arbitrator upheld a discharge for a violation of a zero-tolerance workplace violence policy. In doing so, the arbitrator noted the trend toward zero-tolerance, as well as the employer’s obligation to safeguard its workplace:

In this case, the charge against the grievant is a serious one. Certainly, workplace violence is one of the foremost concerns in our society today and with both [e]mployers and [u]nions alike. In response to those concerns, many [e]mployers have instituted policies to protect workers, both in terms of threats of physical harm as well as actual physical harm. This involves the implementation of the [employer’s] Workplace Violence Policy. This policy is in keeping with the general philosophy that an [e]mployer has a responsibility to provide a safe working environment.

*Id.* at 1400; *See also* *Bell Helicopter Textron Inc.*, 120 Lab. Arb. Rep. (BNA) 1819, 1824 (2005) (Allen, Arb.) (upholding discharge for violation of zero-tolerance policy); *Penske Truck Leasing Co.*, 122 Lab. Arb. Rep. (BNA) 1355 (2006) (Watkins, Arb.) (same); *ELKOURI & ELKOURI*, *supra* note 26, at 1020 (same).

<sup>105</sup> *See supra* note 9 for a discussion of the seven tests of just cause and the potential defenses available to employees under those tests.

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trend.<sup>106</sup> Instead, many arbitrators appear inclined to pay lip service to the problem of workplace violence and the employer's desire to rid its workplace of such behavior through the adoption of a zero-tolerance policy, while at the same time treating workplace violence cases the same as any other run-of-the-mill employment policy violations. Indeed, some arbitrators appear openly defensive about this fact:

The [c]ompany may feel that since this discharge was found to be improper that the [g]rievant and any employee in the future may violate with impunity the [c]ompany's Standards of Conduct Policy and Violence in the Workplace Policy. The arbitrator recognizes the critical importance of both of these policies. My conclusions and opinion are based solely upon the record in the instant case and are obviously not to be interpreted as creating any precedent or license to employees to violate the [c]ompany's Standards of Conduct Policy or its Violence in the Workplace Policy or any other [c]ompany policy, rule or regulation.<sup>107</sup>

Defensiveness aside and as set forth in detail below, to more appropriately deal with the problem of workplace violence, arbitrators must alter their decisionmaking to account for true zero-tolerance in the workplace violence area.

### IV. ZERO-TOLERANCE WORKPLACE VIOLENCE CASES— SOME SUGGESTED ARBITRAL CONSIDERATIONS

Although the issue of workplace violence as a societal problem has become more and more prominent over the last few years, the cases discussed in the previous section demonstrate that the decisionmaking of labor arbitrators has not necessarily kept pace with society's thinking about the issue.<sup>108</sup> Although it appears that arbitral decisionmaking in the context

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<sup>106</sup> See *supra* Part II for a discussion of the problem of workplace violence.

<sup>107</sup> *Safetran Sys. Corp.*, 120 Lab. Arb. Rep. (BNA) 1362, 1366 (2005) (Felice, Arb.). In *Safetran*, the arbitrator reinstated an employee who had been discharged by the employer for threatening a co-worker in violation of a zero-tolerance workplace violence policy. *Id.* at 1363–66.

<sup>108</sup> The point of this article is not necessarily to argue that labor arbitrators do not take workplace violence seriously. That is not the case. Nearly everyone, including labor arbitrators, recognizes the problem and wants to deal with it. The question is whether labor arbitrators can adjust their typical decisionmaking analysis in employee discharge cases to adjust for the typical employer's response to workplace violence.

of discharges for workplace violence has begun to evolve, it has not caught up with the societal response to the problem.<sup>109</sup> As set forth at length above, one of the primary employer responses to workplace violence has been the adoption of zero-tolerance workplace violence policies that attempt to hold employees accountable for any violent actions in the workplace.<sup>110</sup> Although some arbitrators have enforced such policies with an eye toward zero-tolerance,<sup>111</sup> others treat a violation of a zero-tolerance workplace violence policy as no different than a violation of any other employer policy, with no regard to the importance of deterrence, the seriousness of the issue, or how reinstatement of employees affects employees' views on the meaning of "zero-tolerance."<sup>112</sup> The premise of this article is that arbitral decision-making in this area of labor law must evolve, just as society's views on and responses to workplace violence have changed over time.

As an initial matter, arbitrators need to be cognizant of the fact that workplace violence is different than other types of employee disciplinary offenses. It is not about productivity, absenteeism, insubordination, or any other types of archetypal poor work performance that impact an employer's work operations. Rather, unlike those ordinary performance issues dealt with by employers on a daily basis, workplace violence has the ability to affect people's lives in a violent and often irreversible way.<sup>113</sup> For that reason, arbitrators need to be more accepting of the concept of zero-tolerance, even where it involves offenses that do not, at first blush, appear serious enough to warrant severe discipline under an arbitrator's typical analysis of just cause.<sup>114</sup> Case after case, and commentator after commentator, demonstrate that nearly all of the most serious co-worker on co-worker episodes of workplace violence are preceded by smaller employee disciplinary events that were either ignored or never reported to the employer.<sup>115</sup> If that is the

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<sup>109</sup> See *supra* Part III.B.

<sup>110</sup> A good example of that accountability is spelled out in the University of Virginia's Policy, which states, "This is a zero-tolerance policy, meaning that the University disciplines or terminates *every employee* found to have violated this policy." See University of Virginia Workplace Violence/Hostility Policy, *supra* note 3 (emphasis added).

<sup>111</sup> See *supra* note 104.

<sup>112</sup> See *supra* Part III.B.

<sup>113</sup> To understand this point one need look no further than the examples cited *supra* in note 10, in which people's lives were torn apart by a violent incident in the workplace.

<sup>114</sup> See *supra* note 9.

<sup>115</sup> See, e.g., Golden States Foods Corp., 108 Lab. Arb. Rep. (BNA) 705, 707-08 n.1 (1997) (Gentile, Arb.) (noting that mental health professionals regard certain threatening or violent behavior to be "early warning signs" for future more serious

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case, then arbitrators need to treat discipline of such employee behavior in the same way as zero-tolerance policies do, with an eye toward nipping violent behavior in the bud and creating an atmosphere that fosters employee willingness to come forward to report violations of such policies.<sup>116</sup>

Stated another way, arbitrators always must be mindful of the fact that workplace violence has the potential to directly impact the health and safety of employees. Threats often precede physical assaults and murders in the workplace.<sup>117</sup> Little incidents often precede larger and more deadly episodes of employee violence.<sup>118</sup> Zero-tolerance policies are one of the few disciplinary measures that employers have in their respective toolboxes to attempt to remove violent employees from their workplaces and impress upon employees the seriousness of such behavior.<sup>119</sup> Arbitrators should not weaken that tool in the face of the mounting evidence of how serious the

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incidents). Indeed, in the litigation context, employers are often held liable if they knowingly hire an individual with a history of violent misconduct. See Beaver, *supra* note 25, at 118–19.

<sup>116</sup> For an interesting discussion of arbitral decisionmaking in the context of employee addictions as a defense to the imposition of discipline, see Marvin F. Hill, Jr. & Tammy Westhoff, “No Song Sung, No Wine Untasted”—*Employee Addictions, Dependencies, and Post-Discharge Rehabilitation: Another Look at the Victim Defense in Labor Arbitration*, 47 DRAKE L. REV. 399 (1999).

<sup>117</sup> See Hayes, *supra* note 10, at 231–32. In arguing for the implementation of worker ombuds programs to prevent workplace violence, Ms. Hayes concludes that “[t]he most important function of the ombuds office in preventing workplace violence is dealing with conflict. The obvious and inevitable result of unresolved conflict is violence. . . . [B]y targeting conflict (the root of violence) addressing it and taking steps to eliminate it, an ombuds program can prevent violence.” *Id.*

<sup>118</sup> An example of a quick and decisive response to what initially appeared to be an insignificant workplace threat is detailed in Kari Ricci, *Review of Selected 2007 California Legislation: Civil Procedure: Chapter 476: A Three-Pronged Approach to Addressing Issues of Domestic and Workplace Violence*, 38 MCGEORGE L. REV. 61, 61–62 (2007). Ms. Ricci relates the story of an employee who, upon being reprimanded by his employer, made “indirect threats of violence” against his supervisor. *Id.* at 61. After news of the confrontation spread through the workplace, another employee came forward and told the employer that he had heard the same employee threaten to bring a gun to work and shoot co-workers. *Id.* The employer immediately “obtained a temporary restraining order to bar [the employee] from contact with his direct supervisor and entering [the employer’s] premises.” *Id.*

<sup>119</sup> In an analogous context, one commentator recently argued that “[e]mployment discrimination continues to thrive, in part, because of the absence of zero tolerance policies on this issue.” Stephen Plass, *Reinforcing Title VII with Zero Tolerance Rules*, 39 SUFFOLK U. L. REV. 127, 156 (2005).

problem is and of the devastating impact such behavior can have on the lives of employees.<sup>120</sup>

Indeed, even a casual perusal of the cases cited in the preceding section of this article suggests that arbitrators have not yet caught on to the fact that deterrence is one of the key factors separating workplace violence from other types of employee misconduct.<sup>121</sup> For example, in *Lockheed Martin*,<sup>122</sup> the arbitrator clearly was troubled by the fact that the grievant had experienced a series of incidents suggesting that he was either capable of or perhaps even contemplating more serious violent behavior.<sup>123</sup> Yet the arbitrator felt constrained to limit his analysis to only the case at hand and to further disregard employee statements about other incidents suggesting that the grievant may have actually been a ticking time bomb in that workplace.<sup>124</sup> Clearly, the arbitrator's decision in *Lockheed Martin* to return the grievant to work sent a message to employees that is inconsistent both with current societal thinking on dealing with the problem of workplace violence, as well as the concept of zero-tolerance. Rather, the message to the grievant and his co-workers in *Lockheed Martin* was that workplace violence is no different and no more important than other types of poor work performance that may

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<sup>120</sup> Employers also cannot look to the courts to overturn arbitrator decisions that weaken zero-tolerance workplace violence policies. See, e.g., David M. Glanstein, *A Hail Mary Pass: Public Policy Review of Arbitration Awards*, 16 OHIO ST. J. ON DISP. RESOL. 297, 334 (2001) ("[T]he requirement for courts to find a violation of clear, well-defined, and dominant public policy has made it very unlikely that an arbitrator[s] award will be vacated on these grounds."); Judith Stilz Ogden, *Do Public Policy Grounds Still Exist for Vacating Arbitration Awards?*, 20 HOFSTRA LAB. & EMP. L.J. 87, 115-16 (2002) (same).

<sup>121</sup> Goldberg, *supra* note 22, at 421. Mr. Goldberg argues that:

Deterrence is the primary, not derivative function of ex ante solutions. An emerging ex ante solution to workplace violence is the involvement of expert agencies that will formulate, and use sanctions to enforce compliance with, mandatory employer precautions. Expenditures on security and human resources might be more efficient and cheaper than the current expenditures made by U.S. and British employers in attempting to make their workplaces safe from violence.

*Id.*

<sup>122</sup> See *Lockheed Martin Aeronautics Co.*, 123 Lab. Arb. Rep. (BNA) 244 (2006) (Riker, Arb.); *supra* note 45 and accompanying discussion of the case.

<sup>123</sup> *Id.* at 250-51.

<sup>124</sup> *Id.*



## ASSESSING THE ARBITRAL RESPONSE TO WORKPLACE VIOLENCE POLICIES

lead to discipline.<sup>125</sup> Plainly, such a message is inappropriate in this area of labor law.<sup>126</sup> To the contrary, in assessing discipline under a zero-tolerance workplace violence policy, arbitrators can and should consider both the deterrent effect of the particular discipline, as well as the potential for future incidents of violence in the workplace by either this employee or others.<sup>127</sup> To decide otherwise reflects a fundamental misunderstanding of the importance of the issue, as well as the societal consensus on how to deal with the problem.

The arbitral treatment of zero-tolerance workplace violence policy cases can be analogized to the evolution of arbitral thinking on the topic of sexual harassment. Even after the Supreme Court's landmark 1986 decision in *Meritor Savings Bank v. Vinson*,<sup>128</sup> it took many years for arbitrators to catch up with the mounting societal condemnation of sexual harassment as evidenced by the development of the law after *Meritor Savings Bank*.<sup>129</sup>

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<sup>125</sup> Put another way, the message sent by the arbitrator in *Lockheed Martin* is that workplace violence will be tolerated and can be excused in the labor arbitration context.

<sup>126</sup> For an interesting article asserting a link between the "frontier justice" notion inherent in American culture and workplace violence, see Dianne R. Layden, *Workplace Violence: Frontier Justice on the Job*, 23 LEGAL STUD. F. 479 (1999).

<sup>127</sup> In a related context, one commentator has noted the importance of reinforcing the concept of zero-tolerance in the fight to eradicate domestic violence. Sarah M. Teal, *Domestic Violence: The Quest for Zero-Tolerance in the United States and China: A Comparative Analysis of the Legal and Medical Aspects of Domestic Violence in the United States and China*, 5 J.L. SOC'Y 313, 356-57 (2003). Some commentators have explicitly noted the connection between domestic and workplace violence. See, e.g., Vaughn, *supra* note 17, at 234-39 ("This record of violence follows women into the workplace."); Jennifer Moyer Gaines, Comment, *Employer Liability for Domestic Violence in the Workplace: Are Employers Walking a Tightrope Without a Safety Net?*, 31 TEX. TECH L. REV. 139, 143 (2000) ("Because '[w]omen work outside the home in the overwhelming majority of American families,' domestic violence has found a home in the workplace.").

<sup>128</sup> *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (holding that if the attention from a female employee's supervisor were unwelcome, then the employee had a claim for sexual harassment on the basis of a hostile work environment, even if sexual acts were voluntary).

<sup>129</sup> For example, in *Boys Markets Inc.*, 88 Lab. Arb. Rep. (BNA) 1304 (1987) (Wilmoth, Arb.), decided one year after the *Meritor Savings Bank* case, the arbitrator was asked to consider whether the employer had just cause to discharge an employee who "r[a]n his finger in an upward movement between the buttocks of a female co-worker." *Id.* at 1305. The arbitrator, noting the numerous examples of other labor arbitration cases where sexually harassing conduct did not result in the discharge being upheld at arbitration, found that "discharge [was] not [an] appropriate" punishment for such behavior. *Id.* at 1306.

Indeed, the historical “boys will be boys” mentality was often used to excuse employees who were discharged for sexual harassment.<sup>130</sup> Over time, as societal disapproval for sexual harassment became more pronounced, arbitrators began to hold employees more accountable for such behavior.<sup>131</sup> Just as in the area of sexual harassment, arbitral decisionmaking in workplace violence cases, particularly in the area of discipline for violations of zero-tolerance workplace violence policies, must catch up with society’s disapproval of workplace violence and hold employees completely accountable for all violent behavior in the workplace.<sup>132</sup>

Finally, perhaps the most damaging message sent to employees from arbitration decisions reinstating employees who violated a zero-tolerance workplace violence policy is the one sent to the victims. Terrorized (and often terrified) employees are forced to again work side-by-side with a person who may have threatened or physically assaulted them. The message to that person is clearly one that their own personal safety, feelings, or both, do not matter in labor arbitration. Perhaps even more importantly, the implicit message delivered to other employees, all of whom could be potential victims of workplace violence, is that violent conduct should not be reported because the employer cannot do anything about it anyway. Zero-tolerance policies aside, when faced with the prospect of the bully, harasser, or assaulter returning to work side-by-side with them in the workplace, victims may decide that it is not even worth reporting the threat or violent incident in the first place.<sup>133</sup>

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<sup>130</sup> *Id.* at 1306.

<sup>131</sup> Compare the arbitrator’s decision in *Boys Markets*, discussed *id.*, with the arbitrator’s decision in Ohio Dep’t of Pub. Safety, 119 Lab. Arb. Rep. (BNA) 1050 (2003) (Brookins, Arb.), decided more than fifteen years after the *Meritor Savings Bank* decision, where the arbitrator found that the grievant’s sexually harassing conduct “was unwelcome, offensive, adversely affected [the victim’s] job performance, and ultimately was a major factor in constructively discharging her.” *Id.* at 1056.

<sup>132</sup> For a discussion of arbitrator decisionmaking in the sexual harassment area, see Mollie H. Bowers & E. Patrick McDermott, *Sexual Harassment in the Workplace: How Arbitrators Decide*, 48 CLEV. ST. L. REV. 439 (2000).

<sup>133</sup> At least one commentator has pointed out this concern in the context of a discussion of the arbitral treatment of domestic violence issues. Jennifer Atterbury, Comment, *Employment Protection and Domestic Violence: Addressing Abuse in the Labor Grievance Process*, 1998 J. DISP. RESOL. 165, 180 (1998). Ms. Atterbury wrote:

Employers will benefit from preventing workplace violence. Forty-nine percent of senior executives say that domestic violence harms their productivity. Productivity will increase if employees are not preoccupied with violence erupting at work. Taking precautions to protect abused

## V. CONCLUSION

The quotation at the beginning of this article from a Rhode Island court overturning an arbitrator's decision to reinstate an employee discharged by his employer for workplace violence should be the guiding principle for arbitrators as they consider employer disciplinary decisions under zero-tolerance workplace violence policies.<sup>134</sup> The stakes are too high, and the problem too serious, for arbitrators to treat workplace violence like any other type of employee misconduct and reinstate offenders to the workplace. An employer's decision to move toward true zero-tolerance for violent employee behavior in the workplace should be viewed for what it is—part of the evolving societal response to a problem that needs to be addressed by employers and ultimately eliminated from the American workplace. Arbitrators should join that evolution and issue decisions supportive of and in conformity with the concept of zero-tolerance for workplace violence.

One commentator has described the problem of workplace violence as follows:

From a social standpoint, who is at risk from workplace violence? The answer to this question is both employees and third parties, such as on-premises customers, consumers, and suppliers. In 2000, workplace violence was the most significant security concern for employers because of its financial and emotional impact, which can devastate their businesses. Employers must consider the economic costs of workplace violence, including lost

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employees will also make other employees feel more safe. For example, a witness to the [violent workplace episode] did not intervene because she was fearful for her own safety.

*Id.* With respect to labor arbitrators' treatment of employee discipline resulting from incidents of domestic violence, Ms. Atterbury argues that arbitrators should be more educated about the domestic violence epidemic so that their decisions in such cases will be more attentive to the issue and its effect on women. *Id.* at 169–74, 181. For an extensive discussion of the problem of domestic violence in the workplace, see Nicole Buonocore Porter, *Victimizing the Abused?: Is Termination the Solution When Domestic Violence Comes to Work?*, 12 MICH. J. GENDER & L. 275 (2006); see also Sandra S. Park, Note, *Working Towards Freedom from Abuse: Recognizing a "Public Policy" Exception to Employment-At-Will for Domestic Violence Victims*, 59 N.Y.U. ANN. SURV. AM. L. 121, 162 (2003) (advocating adoption of a public policy exception to the at-will employment doctrine for employees who experience workplace problems as the result of domestic abuse).

<sup>134</sup> See *Catholic Cemeteries v. R.I. Laborers Dist. Council*, 177 L.R.R.M. (BNA) 2148, 2154 (2005).

workdays, lost wages, lost revenue, and litigation costs. Additionally, employers must also bear the human costs of workplace violence such as diminished employee morale.

From a legal standpoint, however, the pressing issue concerns who is liable for workplace violence. The most common answer is employers. Thus, employers are contemplating their potential liability and, to no surprise, hoping to limit their liability in the context of workplace violence.<sup>135</sup>

Employees bear the risk and pain of workplace violence, and employers bear the attendant risk of liability. Labor arbitrators should not add to that risk (or pain) by undercutting one of the only preventative measures employers have to fight workplace violence—zero-tolerance workplace violence policies.

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<sup>135</sup> Whitney L. Elzen, Comment, *Workplace Violence: Vicarious Liability and Negligence Theories as a Two-Fisted Approach to Employer Liability. Is Louisiana Clinging to an Outmoded Theory?*, 62 LA. L. REV. 897, 897–98 (2002).